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IN THE

Supreme Court of the United States

October Term, 1982

CINCINNATI MILACRON CHEMICALS, INC., ET AL.,
Petitioners,

—against—

EDWARD BLANKENSHIP, ET AL.,
Respondents,

MINSTER MACHINE COMPANY,
Petitioner,

—against—

VIRGINIA MAE KNITZ,
Respondent,

ST. VINCENT HOSPITAL & MEDICAL CENTER
and ELLA AMBATS,
Petitioners,

—against—

ADELINE T. ZAK and THADDEUS O. ZAK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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July 6, 1982

QUESTIONS PRESENTED

1. May the Chief Justice of the Ohio Supreme Court become a candidate for Governor, raise funds and campaign, but refuse to resign his judicial office and instead adjudicate cases—including cases of demonstrated importance to his campaign contributors—without violating petitioners' Fourteenth Amendment right to a hearing before a fair and impartial tribunal?

2. May Ohio, having adopted a Judicial Code which guarantees to every litigant a hearing before a judge who is not a political candidate, arbitrarily deny that right to petitioners without violating the Fourteenth Amendment guarantee of due process and equal protection of law?

Petitioners have filed one petition seeking a writ of certiorari to review the judgments of the Supreme Court of Ohio in three cases, as provided in this Court's Rule 19.4.

Petitioners in *Cincinnati Milacron Chemicals, Inc., et al. v. Edward Blankenship, et al.* (hereinafter *Cincinnati Milacron*) are Cincinnati Milacron Chemicals, Inc., Ralph Binns, Joseph Mazzei, Kenneth Zeigel, Robert C. Whitman, Ed Wolff, William Jones, and Alan Berenson.

Respondents are Edward Blankenship, Hazel Blankenship, Austin Reed, Mabel Reed, Perry Wood, Mary Wood, Hubert D. Burns, Ruth Burns, Steven R. Brotherton, Deborah S. Brotherton, Kenneth G. Roberts, Jr., Cheryl Roberts, Robert L. Pullens, John Smith, and Marylou Smith.

Additionally, the Ohio AFL-CIO filed a brief *amicus curiae* on behalf of respondents in the court below. The Ohio Chamber of Commerce, American Steel Foundries, General Electric Company, Lighting Business Group, Lampson and Sessions Company, and the Standard Oil Company filed a brief *amicus curiae* on behalf of petitioners in the court below in support of petitioners' motion for rehearing.

Petitioner Cincinnati Milacron Chemicals, Inc., was a wholly-owned subsidiary of Cincinnati Milacron Inc. when this action was brought by respondents. Petitioner has no subsidiaries except wholly-owned subsidiaries. A list of the subsidiaries of its parent, Cincinnati Milacron Inc., as set forth in its 1981 Form 10-K, appears at App. 219. On May 15, 1980, Thiokol Corporation acquired all the outstanding capital stock of Cincinnati Milacron Chemicals, Inc. (now renamed Carstab Corporation). A list of the subsidiaries of Thiokol Corporation, as listed in its 1981 Form 10-K, appears at App. 220.

All of the parties to this petition in *Minster Machine Company v. Virginia Mae Knitz* (hereinafter *Minster Machine*) are listed in the caption. Additionally, in the court below the American Metal Stamping Association filed a brief *amicus curiae* on behalf of petitioners and the Ohio Academy of Trial Lawyers filed a brief *amicus curiae* on behalf of respondents. Petitioner Minster Machine Company has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

All of the parties to this petition in *St. Vincent Hospital and Medical Center and Ella Ambats v. Adeline T. Zak and Thaddeus O. Zak* (hereinafter *St. Vincent Hospital*) are listed in the caption. Petitioner St. Vincent Hospital and Medical Center (technically known as St. Vincent Hospital and Medical Center of Toledo, Ohio) has no parent company or wholly owned subsidiaries. By some definitions it might be termed to be affiliated with the St. Vincent Hospital and Medical Center Foundation and the Farley Health Care Corp., of Toledo, Ohio.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners seek a writ of certiorari to review the judgments of the Supreme Court of Ohio entered on February 26 and March 3, 1982, and the orders denying rehearing entered on March 9 and April 7, 1982.

OPINIONS BELOW

A. Cincinnati Milacron

The opinion of the Supreme Court of Ohio entered on March 3, 1982, is reported at 69 Ohio St. 2d 608, 433 N.E. 2d 572, and appears at App. 9.[1] The unreported opinion of the Court of Appeals of Hamilton County entered on January 14, 1981, appears at App. 32. An unreported opinion of the Court of Common Pleas of Hamilton County issued September 26, 1979, appears at App. 28. An unreported order of the Court of Common Pleas of Hamilton County entered on October 5, 1980, appears at App. 31.

B. Minster Machine

The opinion of the Supreme Court of Ohio entered on February 26, 1982, is reported at 69 Ohio St. 2d 460, 432 N.E.2d 814, and appears at App. 66. The unreported opinion of the Court of Appeals of Lucas County entered on December 19, 1980, appears at App. 83. The unreported judgment entry and opinion of the Court of Common Pleas of Lucas County entered on February 19, 1980, appears at App. 79.

C. St. Vincent Hospital

The opinion of the Supreme Court of Ohio entered on February 26, 1982, is reported at 69 Ohio St. 2d 471, 433 N.E.2d 162, and appears at App. 123. The unreported opinion of the Court of Appeals of Lucas County entered on March 6, 1981, appears at App. 138. The unreported memorandum decision and judgment entry of the Court of Common Pleas of Lucas County entered on May 19, 1980, appears at App. 129.

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[1] References to the appendix to this petition will be cited as "App. ".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

The judgment of the Supreme Court of Ohio in *Cincinnati Milacron* was entered on March 3, 1982. Petitioners' timely petition for rehearing was denied on April 7, 1982. (A copy of the order denying that petition appears at App. 42.) The time within which to file a petition for certiorari extends to July 6, 1982.

The judgment of the Supreme Court of Ohio in *Minster Machine* was entered on February 26, 1982. Petitioner's timely petition for rehearing was denied on March 9, 1982. A copy of the order denying that petition appears at App. 103.

The judgment of the Supreme Court of Ohio in *St. Vincent Hospital* was entered on February 26, 1982. Petitioners' timely motion for rehearing was denied on March 9, 1982. A copy of the order denying that petition appears at App. 143.

An order signed by Justice Sandra D. O'Connor on May 27, 1982, extended to July 6, 1982, the time to file petitions for writs of certiorari by Minster Machine Company and St. Vincent Hospital & Medical Center and Ella Ambats. A copy of that order appears at App. 7.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution (App. 1.)

Ohio Code of Judicial Conduct, Canon 7, 36 Ohio St. 2d xix, xxxii (1974) (App. 1.)

STATEMENT OF THE CASE

The events which require the filing of this petition first arose while petitioners' cases were pending before the Supreme Court of Ohio. Those events, together with the procedural history of the cases below, are as follows:

1. The Announcement of the Chief Justice's Gubernatorial Candidacy

At a press conference held in the Statehouse Rotunda in Columbus, Ohio, on January 15, 1982, Chief Justice Frank D. Celebrezze of the Ohio Supreme Court announced his candidacy for the Democratic Party nomination for Governor of the State. The Chief Justice repeated that announcement at press conferences in Cleveland later that day and in Toledo and other cities on January 19, 1982. (App. 161,121.)

The Chief Justice's announcement was accompanied by a press release, dated January 15 and issued on his Supreme Court stationery. The press release announced that "I will be a candidate for governor", that "this has been both the most difficult and the easiest decision of my life, but I feel this decision is right. One of the reasons is the support of my wife, Mary Ann. We have talked and prayed over it for months." (App. 161.)

The Chief Justice went on to state:

> "I will inform the public, directly, what to expect from a Celebrezze administration—on jobs, senior citizens, crime and justice, the budget, education, mass transportation, energy and our environment—all of the matters that concern Ohioans. . . .
>
> "The plain fact is that we can no longer accept a state administration which lurches from crisis to crisis—spending more, delivering less and watching the quality of Ohio life decline. For example, nearly 13 percent of our people—643,000 men and women—are now out of work. Our situation demands straight talk and unconventional action. We need to recapture control of Ohio's destiny." (App. 162-63.)

After noting that "[m]y campaign will never ... match my opponents' financial warchests", the Chief Justice concluded:

> "I want to be Governor because I believe there are millions of honest Ohioans who feel that the system isn't working for them. I believe Ohio deserves better, and I am confident that my candidacy is best for Ohio." (App. 163.)

Chief Justice Celebrezze was aware that Ohio's Code of Judicial Conduct—like the Judicial Codes for forty-seven other states and for the federal courts—requires that "a judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office. ..." (Canon 7(A)(3), 36 Ohio St. 2d xix, xxxii (1974); App. 2.)[2] The Ohio Code is mandatory and is binding on all judicial officers in the State.[3] The Code provision was adopted by the Ohio Supreme Court under its state constitutional power to

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[2] The code provisions for the federal courts and states other than Ohio are listed and discussed at App. 215-18. These code provisions have consistently been upheld against constitutional challenge. *See, e.g., Signorelli* v. *Evans,* 637 F.2d 853 (2d Cir. 1980); *Morial* v. *Judiciary Commission of Louisiana,* 565 F.2d 295 (5th Cir. 1977), *cert. denied,* 435 U.S. 1013 (1978). *See also Clements* v. *Fashing,* 50 U.S.L.W. 4869 (U.S. June 25, 1982)(No. 80-1290).

[3] In its Preface to the Code of Judicial Conduct, the Supreme Court stated that "The canons and text establish mandatory standards unless otherwise indicated". 36 Ohio St. 2d at xix.

In *Cuyahoga County Board of Mental Retardation* v. *Association of Cuyahoga County Teachers of the Trainable Retarded,* 47 Ohio App. 2d 28, 351 N.E.2d 777 (Cuyahoga County 1975), the Court said:

> "In examining the Code of Judicial Conduct it is apparent that while the permissible guidelines are indicated by the use of the word 'may,' the mandatory portions are set forth by the use of the word 'should.' This is entirely consistent with the plain meaning of a word which expresses an obligation or duty." (47 Ohio App. 2d at 33, 351 N.E.2d at 782.)

Rule IV of the Supreme Court Rules for the Government of the Bar of Ohio provides that the Code of Judicial Conduct "shall be binding upon all judicial officers of this state". Rules Governing the Courts of Ohio 571, 577 (Anderson 1981).

regulate "[a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law". Ohio Const. art. IV, § 2. *See Mahoning County Bar Association v. Judge Franko*, 168 Ohio St. 17, 151 N.E.2d 17 (1958), *cert. denied*, 358 U.S. 932 (1959).

Chief Justice Celebrezze, however, did not resign on January 15. Instead, he announced at that time that he would continue to participate in the cases then pending before the Supreme Court in which argument had been heard, and would not resign until "immediately following release" of those decisions. (App. 161.) He announced that he had a "personal deadline of the week of February 22" and that he was "doing everything I can to expedite that process". (App. 161.) The Chief Justice also said that he would make no more politcal statements before his resignation, but his campaign plans and fund-raising activities went forward, including arrangements for a fund-raising dinner on the night he ultimately resigned. App. 121, 210-14.)

The Ohio Supreme Court apparently sought to cooperate with its Chief Justice's plan, although it proved unable to meet his "personal" February deadline for resigning. Between January 15 and March 9—the date on which the Chief Justice finally tendered his resignation—the Ohio Supreme Court produced an unprecedented flurry of decisions: in that seven-week period, over 95 cases were handed down, more than double the average number decided during the entire first quarter in the preceding five years. (*Compare* 69 Ohio St. 2d 47-684 (1982) *with* 65 Ohio St. 2d 1-130 (1981); 61 Ohio St. 2d 1-375 (1980); 57 Ohio St. 2d 1-129 (1979); 53 Ohio St. 2d 1-253 (1978); 49 Ohio St. 2d 155-295 (1977).)

The Chief Justice's continued participation in these cases after he became a gubernatorial candidate was unnecessary. Four justices constitute a quorum of the Ohio Supreme Court (Ohio Const. art. IV, § 2), and the court routinely decides cases with fewer than its full complement of seven justices—indeed, a

number of decisions between January 15 and March 9 were rendered with fewer than seven justices.[4]

2. The Chief Justice's Participation In the Decisions Below

Petitioners were defendants in three of the cases decided by the Ohio Supreme Court after Chief Justice Celebrezze became a candidate for Governor but before he resigned from the court. Two of these cases involved active campaign contributors (as adversaries to petitioners) and issues which were demonstrably important to them and to other groups influential in state politics:

In *Minster Machine,* plaintiff (respondent here) had brought suit for damages as a result of the amputation of two of her fingers while operating a power press manufactured by petitioner Minster Machine Company. The trial court granted summary judgment for petitioner and the Court of Appeals affirmed. (App. 79, 83.)

On appeal to the Ohio Supreme Court, the case attracted considerable attention from competing interest groups. *Amicus curiae* briefs were filed (with the court's permission) on behalf of petitioner by the American Metal Stamping Association and on behalf of respondent by the Ohio Academy of Trial Lawyers. In its motion for leave to file an *amicus* brief, the Trial Lawyers' Academy noted that the lower court's decision "adversely affects the members of the Ohio Academy of Trial Lawyers and their clients" and that the "interest of its member attorneys and their clients in the within case is substantial. . . ."

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[4] Three cases were decided by a six-judge court: *Cleveland Electric Illuminating Co.* v. *Public Utilities Commission,* 69 Ohio St. 2d 258 (February 17, 1982) (Krupansky, J., who recused herself after oral argument, not participating); *State ex rel. Duganitz* v. *Court of Common Pleas,* 69 Ohio St. 2d 270 (February 19, 1982) (Krupansky, J., not participating); *Columbus Bar Association* v. *Thompson,* 69 Ohio St. 2d 667 (March 9, 1982) (Riley, J. (a lower state court judge), sitting for Celebrezze, C.J.; Sweeney, J., not participating).

(App. 206, 207.) The Ohio Academy of Trial Lawyers had contributed at least $1,000 for a fund-raising dinner in April 1981 to "advance the public image of Frank D. Celebrezze".[5]

On February 26, by a four-to-three vote, the Supreme Court ruled in favor of respondent in *Minster Machine*, reversing the decisions of the lower courts and announcing a new standard of strict liability, one that holds a product design "defective" if "(1) it is more dangerous than an ordinary consumer would expect ... or (2) if the benefits of the challenged design do not outweigh the risk inherent in such design." The court explicitly authorized juries within the state to apply the new standard on the basis of "hindsight" rather than foreseeability. (App. 72.) Chief Justice Celebrezze cast his vote—a decisive vote—with the 4-to-3 majority.

In *St. Vincent Hospital*, the plaintiffs below (respondents here) had brought suit for damages as a result of allegedly negligent medical treatment during respondent Adeline Zak's hospitalization. The trial court dismissed all claims as untimely under the one-year statute of limitations governing medical malpractice claims. The Court of Appeals affirmed. (App. 129, 138.) On February 26, 1982, the same day the *Minster Machine* decision was handed down, the Ohio Supreme Court reversed the decisions of the lower courts and held that the "malprac-

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[5] App. 164,179. Appendix 164-201 contains a public campaign report on file with the Ohio Secretary of State, of which this Court may take judicial notice. *See, e.g., Massachusetts* v. *Westcott*, 431 U.S. 322, 323 n.2 (1977). The dinner attracted contributions totaling approximately $47,000. (App. 164.) The dinner could only have been held for purposes of the Chief Justice's political campaign. Fund-raising for a *judicial* campaign in Ohio is restricted to 120 days before or after the election and may only be carried out by a single committee. *See* Ohio Code of Judicial Conduct, Canon 7(B). The fund-raising dinner in April 1981 occurred more than 120 days after the Chief Justice's November 1980 election to a six-year term. The reports filed on behalf of the Chief Justice further show that his fund-raising efforts were carried out by at least four separate political committees. Thus, the restrictions applicable to judicial campaigns were not met with respect to the April 1981 dinner.

tice" statute of limitations for "hospital[s]" does not encompass the conduct of nurses and hospital laboratory technicians. (App. 124-25.) The court's decision was four-to-three, with Chief Justice Celebrezze in the majority.

In *Cincinnati Milacron,* plaintiffs below (also respondents here) had sought compensatory and punitive damages for illnesses allegedly suffered as a result of exposure to chemicals in the course of their employment by petitioner Milacron. The trial court granted a motion to dismiss the complaint on the ground that the Ohio Constitution and Ohio Workers' Compensation Act provided the exclusive remedy and precluded civil suit. (App. 28.) The Court of Appeals affirmed. (App. 32.)

On appeal to the Ohio Supreme Court, the *Cincinnati Milacron* case attracted significant attention from labor and business interests. The Ohio AFL-CIO—which for many years has been a major force in the state's politics—filed an *amicus curiae* brief (with the court's permission) on behalf of plaintiffs. It told the court:

> "Participation is desired because of the continuing interest and concern of the Ohio AFL-CIO with the laws of the State dealing with Ohio Workers' Compensation, which are directly affected by the issues presented in this case. The Ohio AFL-CIO has, over the years, been involved in extensive participation in testifying and lobbying legislation involving Workers' Compensation.
>
> "A substantial number of individuals who are members of Local Unions affiliated with the Ohio AFL-CIO are amenable to the Workers' Compensation Laws, and may be affected by the Court's decision herein." (App. 203.)

The AFL-CIO, together with other labor unions, had contributed at least $4,000 in 1981 to "advance the public image of Frank D. Celebrezze". (App. 164.)[6]

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[6] Contributions included: Ohio AFL-CIO, $100; Laborers International Union of North America, Local 310, $1,000; Firepac Local No. 93, $1,000; Ohio State Building and Construction Trades Coun-

On March 3, a week after the Chief Justice's original "deadline" for resigning had passed without a resignation, the Ohio Supreme Court ruled in favor of the plaintiff-workers in *Cincinnati Milacron* and reversed the lower courts by a judgment announced with: (i) an opinion for the court; (ii) two concurring opinions; (iii) one opinion concurring in part and dissenting in part; and (iv) two dissenting opinions.

The Chief Justice filed one of the concurring opinions in the case. That opinion is reproduced at App. 18-19. The opinion carries the unmistakable ring of political speechmaking. In it, the Chief Justice described the dissent as "an enemy of all workers," as champions of "a 19th century 'robber baron' " position, and as "remarkably insensitive to the particularly egregious behavior on the part of employers . . . which the state has an interest in preventing." (App. 18.) The Chief Justice also accused petitioner of "fraudulently misrepresenting or concealing workplace hazards" (App. 18), despite the fact that the case below had been dismissed on the pleadings and there had not yet been any hearing on the merits. The Chief Justice's opinion concluded:

> "The bottom line of this case is that prohibiting an employee from suing his or her employer for intentional tortious injury would allow a corporation to 'cost-out' an investment decision to kill workers. *This abdication of employer responsibility, as represented by the dissenters, is an affront to the dignity of every single working man and working woman in Ohio.*" (App. 19; emphasis added.)

3. The Denial of Rehearing in *Minster Machine* and *St. Vincent Hospital*

On March 8, the defendants in *Minster Machine* and *St. Vincent Hospital* (petitioners here) filed timely motions for

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cil—Educational Fund, $200; Laborers International Union of North America, $200; United Auto Workers Ohio State Political Action Committee, $1,000; Cleveland Building and Construction Trades Council, $200; Carpenters District Council, $500; Cincinnati AFL-CIO Labor Council, $100; Columbus Building and Construction Trades Council, $100." (App. 164-201.)

rehearing. These motions, in largely identical language, claimed that a failure to grant rehearing because of the Chief Justice's participation after he had become a candidate for Governor "will result in violations of [petitoners'] rights under the ... Fourteenth Amendment of the United States Constitution", in that petitioners have been "deprived of [their] right to due process of law". (App. 117, 119, 156-57.)[7]

Ordinarily, opposing counsel would have had five days to submit briefs in opposition to motions for rehearing. (Rules of Practice of the Supreme Court of Ohio, Rule IX, 25 Ohio Rev. Code Ann. 100 (Page 1981).) But within hours after the motions were filed in these cases, the Chief Justice personally telephoned counsel for petitioners and advised them to be in Columbus for a proceeding before the full court the next day, March 9, 1982. The Chief Justice refused to explain what the nature of the proceeding was to be and stated that he did not want opposing counsel present. Such a proceeding is wholly unprecedented in the experience and knowledge of counsel for petitioners.

Counsel for petitioners attended the proceeding on March 9, 1982. Counsel for respondents were not present and no record was made. The proceeding was held in the court's conference room (again, an unprecedented event, in counsel's experience). Some members of the court: (i) questioned the ethical propriety of raising the Chief Justice's participation as a basis for the motion for rehearing; and (ii) suggested that petitioners should present their federal constitutional claims directly to the United States Supreme Court.[8]

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[7] Petition for rehearing was the first state procedure available for raising petitioners' constitutional claims. Ohio's judicial disqualification statutes do not apply to the State's Supreme Court Justices. *See* Ohio Rev. Code Ann. §§ 2101.39, 2501.13, 2701.03, 2937.30 (Page 1981).

[8] One member of the court said that the issues raised by the motions for rehearing were not in any way improper; some other members sat mute during the proceeding.

That same day, March 9, without waiting for opposing papers, rehearing was denied in both cases without opinion. The Chief Justice did not disqualify himself from participation in the court's denial of rehearing. (App. 103,143.)

Also on March 9, the Chief Justice submitted his formal resignation to the Governor, to take effect on Monday, March 15. The Chief Justice then left Columbus to attend a planned campaign fund-raising dinner for him in Parma, Ohio. (App. 210.)[9]

4. The Chief Justice's Termination of His Candidacy and The Denial of Rehearing in *Cincinnati Milacron*

On March 10, 1982, Chief Justice Celebrezze suddenly ended his gubernatorial candidacy and withdrew his March 9 resignation from the Ohio Supreme Court. According to press reports, the Chief Justice stated that a financial supporter who had promised to raise or donate $100,000 of the $750,000 needed for his campaign had withdrawn support. (App. 213.)

On March 15, 1982, petitioners filed a timely motion for rehearing in *Cincinnati Milacron* which claimed, *inter alia*, that the Chief Justice's participation in the decision after he became a gubernatorial candidate "deprive[d] Appellees of their right to due process guaranteed by the Fourteenth Amendment of the United States Constitution". (App. 64.) The motion for a rehearing was denied on April 7, 1982, without opinion; the Chief Justice is not recorded as disqualifying himself from participation in that decision. (App. 42.)

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[9] Appendix 210-214 contains two newspaper articles, dated March 11, 1982, reporting the Chief Justice's resignation and the subsequent withdrawal of his resignation. These articles appeared after the petitions for rehearing were filed in *Minster Machine* and *St. Vincent Hospital* and could not, therefore, have been made part of the record below. In any event, the fact of the Chief Justice's resignation (as well as his later withdrawal of it) is not a matter subject to dispute between the parties.

REASONS WHY THE WRIT SHOULD BE GRANTED

The writ should be granted here because:

1. The Ohio Supreme Court's actions below conflict with *Tumey v. Ohio* and its progeny and deprive petitioners of their due process right to a hearing before a fair and impartial tribunal—a tribunal whose decisionmaking is not in fact or appearance tainted by the partisan political needs of its chief judicial officer.

2. The Ohio court's actions capriciously and unfairly deny to petitioners a fundamental right which the State's Judicial Code extends to every other litigant in the State: the right to hearings before judges who are not engaged in partisan political campaigns and who cannot weigh or appear to weigh their political campaign necessities in the balance of their judicial decisions.

3. The constitutional question whether judges are required to resign from their judicial positions or otherwise refrain from judicial decisionmaking once they become partisan political candidates is an important one and one on which petitioners manifestly did not have a fair hearing in the court below.

1. The Decisions Below Conflict with *Tumey v. Ohio* and the Due Process Standard for Fair and Impartial State Tribunals

The right to a fair and impartial tribunal is the most fundamental constitutional right of any litigant in any court. Even "the appearance of evenhanded justice" is "at the core of due process". *Mayberry v. Pennsylvania,* 400 U.S. 455, 469 (1971) (Harlan, J., concurring).

The fountainhead for the Court's Fourteenth Amendment holdings in this area is the unanimous decision in *Tumey v. Ohio,* 273 U.S. 510 (1927). The Court there found that a mayor's small "direct, personal, pecuniary interest in convicting

the defendant" violated due process. (*Id.* at 523, 531-532.) The court further found:

> "But the pecuniary interest of the Mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here." (*Id.* at 532.)

The Court looked to the mayor's interest "in the financial condition of the village, and his responsibility therefor" and queried: "might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?" (*Id.* at 533.) The Court thus held: "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." (*Id.* at 534.)

The constitutional standard formulated in *Tumey* was this:

> "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." (*Id.* at 532.)

This constitutional standard has since been applied to state civil and administrative proceedings as well as to criminal trials[10] and has been extended repeatedly beyond immediate

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[10] *See, e.g., Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471, 485-486 (1972); *Johnson* v. *Mississippi*, 403 U.S. 212, 215-216 (1971); *In re Murchison*, 349 U.S. 133, 136-139 (1955); *see also Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968).

financial interests, to the "various situations . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable". *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).[11]

In all of these cases, the Court has consistently looked to what "in the very nature of things" or as a "practical matter" may create the seeds or probability of prejudice or impermissible interest. (*In re Murchison, supra*, 349 U.S. at 137-138.)

The actions of the Ohio Supreme Court in the cases here flatly conflict with this constitutional standard. By permitting its Chief Justice to sit and decide cases after he was a candidate for Governor, the Ohio court—

> (a) tolerated a financial interest that beyond argument "would offer a possible temptation to the average man as a judge. . . which might lead him not to hold the balance nice, clear and true. . . ."; and
>
> (b) acquiesced in the joinder of "practically and seriously inconsistent positions, one partisan and the other judicial, [which] necessarily involves a lack of due process. . . ." (*Tumey*, 273 U.S. at 532, 534.)

We consider these two issues separately.

a. *The Chief Justice's Impermissible Financial Interest*

Political campaigns today require enormous sums of money. These sums are "an ever more essential ingredient of an effective candidacy". *Buckley v. Valeo*, 424 U.S. 1, 26 (1976)

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[11] *See, e.g., Morrissey* v. *Brewer, supra*, 408 U.S. at 485-486 (where the parole officer's involvement with parolee meant that the former "cannot always have complete objectivity"); *Taylor* v. *Hayes*, 418 U.S. 488, 501-503 (1974) (where a judge has been the target of personal abuse and criticism from the party before him); *Ward* v. *Village of Monroeville, supra*, 409 U.S. at 58 (where village income was derived from fines imposed by the mayor in his "mayor's court", although the mayor himself did not receive the fines).

(per curiam). What the need for these large sums means as a practical matter is that candidates simply cannot afford to divorce what they say or do from its effect on their campaign fund-raising.

Judges who become partisan political candidates are in no sense immune from these financial pressures. There is utterly no constitutional warrant to treat them differently and hold that they will be disinterested in how their actions on the bench may affect their ongoing political campaigns and their financial supporters.

In applying the Fourteenth Amendment's due process standard, this Court has found impermissible a judicial officer's financial gain of only $5, *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam), and has held that even where no money was received personally, a judge's interest as mayor in enhancing his town's finances rendered him unfit to act impartially in traffic cases involving fines of only $50. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

If those cases are good law, then petitioners are entitled to the writ here. The Ohio Chief Justice—as a candidate for Governor—stood to gain or lose hundreds of thousands of dollars depending on how his judicial actions affected his campaign. In at least two of the cases presented here, campaign contributors filed *amicus* briefs on the merits against petitioners. (*See* pages 7-8, 9 above.) And in the *Cincinnati Milacron* case, the *amicus* was the AFL-CIO, an organization with immense influence in Democratic Party politics in Ohio. It simply cannot be said that the Chief Justice, as a Democratic gubernatorial candidate, had no "possible temptation" to decide in favor of the AFL-CIO's position in the hope of attracting campaign money.

And even if the Ohio Chief Justice was in fact unaware of the particular campaign contributions by the *amici* below (petitioners only learned of them after rehearing was denied in these cases), there still remains the impermissible probability

that he—or any judge who becomes a partisan political candidate—may allow his judicial decisions to be affected by his need for campaign funds. That probability alone is sufficient to invoke Fourteenth Amendment protection. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980); *Ward v. Village of Monroeville*, 409 U.S. at 60; *Mayberry v. Pennsylvania, supra*, 400 U.S. at 463-66; *In re Murchison, supra*, 349 U.S. at 136. *Cf. Offutt v. United States*, 348 U.S. 11, 14-15 (1954). And there can be no question that that probability exists—common sense tells us so, and common sense is confirmed by the existence of the Judicial Codes in virtually every state of the union outlawing precisely that danger. (*See* page 18 below and App. 215-18.)

b. The Chief Justice's Impermissible Position as a Political Candidate

Even if politics were costless and candidacies free-of-charge, petitioners' Fourteenth Amendment rights would have been violated by the Ohio Chief Justice's participation in their cases after he became a gubernatorial candidate.

As this Court held in *Tumey*:

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law. . . ." (273 U.S. at 534.)

Being a candidate for Governor of Ohio is every bit as inconsistent with the impartiality required of a judge as being the mayor of North College Hill, Ohio or of Monroeville, Ohio. (*Id.* at 515; *Ward v. Village of Monroeville.*) Such a candidacy creates precisely the kind of strong "motive to help", the kind of "partisan" responsibilities, that render political incumbents constitutionally unfit to be fair and impartial judicial decisionmakers. (*Tumey*, 273 U.S. at 533; *Ward*, 409 U.S. at 60.)

In the *Cincinnati Milacron* case, for example, the Chief Justice—a Democratic gubernatorial candidate—had to decide

as judge between conflicting claims of labor and business litigants in a case involving: (i) politically volatile allegations of intentional conduct that resulted in the poisoning of workers; (ii) the basic reach of Ohio's Workmen's Compensation laws; and (iii) the AFL-CIO, which had come out publicly as *amicus* on the side of the workers. The issues at stake in the case affected virtually every employer in the State and most employees. In such a context, the Chief Justice, as a practical matter, "perforce occup[ied] two practically and seriously inconsistent positions, one partisan and the other judicial". (*Tumey*, 273 U.S. at 534.)

The rhetoric of the Chief Justice's concurring opinion in *Cincinnati Milacron* suggests that he in fact did mix his two inconsistent positions: calling the dissent "an enemy of all workers", and "an affront to the dignity of every single working man and working woman in Ohio" is the language of a politician, not a judge. (433 N.E.2d 572, 578-79; App. 18-19.) And imposing a "personal" deadline for deciding cases so that he could free himself to campaign full-time is similarly the conduct of a politician, not a court.

These actions may not have been consciously motivated by the Ohio Chief Justice's political necessities. But whether they were in fact or not does not control. What does control is *first*, that no court may, consistent with the Constitution's due process standard, presume that judges who are partisan political candidates will be indifferent to the necessities of their campaigns while on the bench. And *second*, that the appearance and probability of interest or bias by judges who are such candidates is sufficient to invoke Fourteenth Amendment protection.

The Judicial Codes for forty-eight states and the District of Columbia, the ABA Code of Judicial Conduct and the Code of Judicial Conduct for United States Judges all recognize the inherent inconsistency between judicial decisionmaking and partisan political candidacies. (*See* App. 215-18.) For over half a century, beginning with the ABA Canons adopted in 1924, and continuing in the Judicial Codes of today, the

judgment of this country's bar and of virtually every state has been that judges must resign their judicial position when they become candidates for partisan political office.[12] That judgment is a reflection both of the realities of political campaigns and of the due process standard announced by this Court in *Tumey*.

c. ***The Chief Justice's "Inactive" Candidacy is Constitutionally Impermissible***

During one of the press conferences held by the Chief Justice when he announced his gubernatorial candidacy, he reportedly said that he would make no more political statements before he resigned his judicial office. (App. 121.) Presumably, the Chief Justice concluded, with his court's assent, that such an arrangement would satisfy both Ohio's Judicial Code and petitioners' federal due process rights.

This arrangement, however, satisfies neither, for at least these reasons:

First, the Chief Justice did not halt all campaign activity during his self-imposed interregnum. Plainly, fund-raising activities and other campaign efforts went forward. Indeed, a fund-raising dinner was held on the very night the Chief Justice ultimately resigned. (App. 121, 210, 213.)

Second, the very act of "doing everything I can to expedite" the court's pending cases so that he could meet his "personal deadline" for resigning (App. 161) is the act of a political candidate, not a Chief Justice.

Third and most important: one cannot contend that the formal announcement of a gubernatorial candidacy is a matter of indifference to the candidate. Many people may be rumored to be candidates or may "test the waters" through receptions or dinners. But once a formal announcement is made, a person cannot help but assume the role of candidate. Plans must be

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[12] "One area of activity which has by common consent been clearly defined as being out of bounds for a judicial officer is the area of partisan political activity." Rifkind, *A Judge's Nonjudicial Behavior,* 37 N.Y. State Bar J. 22, 24 (1966).

made by the candidate himself or on his behalf. Campaign resources must be found and marshalled. Issues have to be considered and the like.

Nor may it be said that the announcement of Chief Justice Celebrezze's candidacy was merely to "test the waters". On the contrary, the avowed "purpose of [the] statement [was] to acknowledge my awareness of public speculation concerning my becoming a candidate for Governor of Ohio in the forthcoming Democratic Primary. *I will be a candidate for governor.*" (App. 161; emphasis added.)

To say one may announce a gubernatorial candidacy with a flourish of campaign rhetoric and press conferences around the state and then proceed as if the announcement never took place is to indulge in the kind of fiction this Court has never tolerated in its due process decisions. *See, e.g., Morrissey v. Brewer, supra,* 408 U.S. at 485-486.

2. The Decisions Below Deny Petitioners Equal Protection of Law

The Code of Judicial Conduct of Ohio—promulgated by the Ohio Supreme Court under its state constitutional mandate—guarantees to all litigants in the state the right to hearings before judges who are not candidates for political office.

Petitioners were deprived of that right by the Ohio Chief Justice's participation in their cases, in violation of the Fourteenth Amendment's guarantee of equal protection and due process of law.

a. *The State-Created Right at Issue Here*

Canon 30 of the Canons of Judicial Ethics, adopted by the Ohio Supreme Court in 1954, required that a judge who becomes a political candidate resign. *See* 176 Ohio St. lxxvii, lxxxiv (1964). Canon 7(A)(3) of the Ohio Code of Judicial Conduct, which replaced Canon 30 in 1973, continued the resignation requirement. (36 Ohio St. 2d xix, xxxii (1974);

App. 2.) Under Ohio law, the Judicial Code is mandatory, not discretionary, and is binding upon all judicial officers, including supreme court justices. (*See* page 5 n.3 above.)

Ohio has long recognized the fundamental importance of this right. In 1958, for example, the Ohio Supreme Court upheld the suspension from the practice of law of a lower court judge who became a political candidate and refused to resign. *Mahoning County Bar Association v. Judge Franko,* 168 Ohio St. 17, 151 N.E.2d 17 (1958), *cert. denied,* 358 U.S. 932 (1959). The court there stated that people in the state "have a right to expect" that their judges, once elected to the judiciary, will "remain outside and distinct from the 'mainstream' of partisan politics" in order to insure the judiciary's "independence, impartiality and freedom from bias, prejudice and pressure . . . ." (*Id.,* 151 N.E.2d at 25.) The court explained that Canon 30's requirements that a judge resign when he becomes a political candidate

> "are not merely arbitrary rules of conduct laid down by this court, but are requirements bottomed on the premise that the judiciary of the State of Ohio shall be kept as far as possible from the 'mainstream' of partisan politics, all things considered, and that the resignation of a judge who becomes a candidate for a nonjudicial office is a reasonable measure designed to preclude the possibility of the intrusion of partisan politics into the administration of justice and to preclude even the suspicion of such intrusion, which would normally attach to every ruling a judge who retains the bench while a candidate for a nonjudicial office might make, *regardless of his intent or the soundness or justice of such ruling."* (*Id.*) (Emphasis by the court.)

b. *The Arbitrary and Discriminatory Denial of that Right Below*

This Court has repeatedly held that once a state posits a right on behalf of its citizens, the Equal Protection Clause of the Fourteenth Amendment prevents the state from denying that

right to some citizens without a constitutionally sufficient justification. *See, e.g., Mills v. Habluetzel,* 102 S. Ct. 1549, 1551, 1553 (1982); *Gomez v. Perez,* 409 U.S. 535, 538 (1973); *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). Thus, for example, although the Constitution may not in and of itself require a state to provide appellate review of trial court judgments, once a state does grant the right to such review, it may not deny that right to some in the absence of constitutionally sufficient reasons. *Griffin v. Illinois, supra.*

Given the vital importance of fairness and impartiality and the appearance of both in state judicial proceedings, a demanding equal protection standard is appropriate here. But the Ohio Supreme Court's actions below fail to meet *any* of the standards of inquiry under the Equal Protection Clause: Chief Justice Celebrezze's participation in the cases pending when he became a candidate for Governor furthered no legitimate interest of the State.

The Chief Justice's participation cannot be said to have furthered any State interest in judicial efficiency or economy. As noted, the Chief Justice's participation in the decisions handed down between January 15 and March 9 was unnecessary. (*See* pages 6-7 above.) The Ohio Supreme Court was empowered by the State constitution to decide the pending cases with its six remaining justices and in fact did so in other cases in that same period. The Court was also empowered to appoint a court of appeals judge to sit in the Chief Justice's place (Ohio Const. art. IV, § 2(A)) and in fact did just that in another case decided on March 9, 1982, the very day rehearing was denied in *Minster Machine* and *St. Vincent Hospital.* (*See* page 7 n.4 above.) Some reargruments may have had to be held in the Chief Justice's absence. But the marginal cost in terms of the judicial effort required by any such reargruments can hardly be considered sufficient to justify a denial of petitioners' rights under the State's mandatory Judicial Code Canon 7(A)(3).

See, e.g., Mills v. Habluetzel, 102 S.Ct. 1549, 1555 (1982); *Stanley v. Illinois,* 405 U.S. 645, 656-657 (1972); *Reed v. Reed,* 404 U.S. 71, 76 (1971); *Carrington v. Rash,* 380 U.S. 89, 96 (1965).

The only other possible justifications for the court's actions below are equally insubstantial or outright impermissible. To the extent the court sought to accommodate the Chief Justice's political time-table or his campaign needs or his personal desire to avoid the appearance of leaving the court "in the lurch"—those justifications are plainly insufficient, if permissible at all, when set against the important state-created right to be heard by judges who "must remain outside and distinct from the 'mainstream' of partisan politics". (*Mahoning County Bar Association v. Judge Franko, supra,* 151 N.E.2d at 25.)

In sum: the Ohio Supreme Court has effectively ruled that every litigant in the State is entitled to the protection of Ohio Judicial Code Canon 7(A)(3) *except* those litigants whose cases happen to have been decided by that court between January 15 and March 9, 1982.

That ruling is unfair and capricious. It has deprived petitioners of an important state-created right in violation of the Fourteenth Amendment guarantees of equal protection and due process of law.

3. The Importance of the Questions Presented and the Conduct of the Ohio Court Below Require that the Writ Be Granted

There are no questions more worthy of this Court's time and attention than questions which go to the basic fairness and impartiality of the country's judicial system, state and federal. People have the fundamental right to expect that when they come before this country's courts the judges will not be biased or prejudiced or decide cases for reasons of partisan politics. The expectation and the strictures of impartiality lie at the very core of what distinguishes courts of law from the political world.

Petitioners believe with reason that they have not had a hearing before an impartial court. This federal claim is important and substantial—and, manifestly, petitioners have not had a fair hearing on it below.

On or before January 15, the Ohio Supreme Court apparently decided that its Chief Justice could continue to sit despite his announced gubernatorial candidacy, despite Ohio's Judicial Code and despite the Fourteenth Amendment teachings of this Court, which the Ohio court is most certainly aware of. *See, e.g., Tumey v. Ohio; Ward v. Village of Monroeville.* The Ohio court went so far as to expedite its decisions on pending cases to help its Chief Justice meet his "personal" political deadline. Petitioners had no opportunity to address the court before it took these actions.

When petitioners raised their federal claim of unfairness—in the first procedure available to them—what they received in response was either a single word, "denied", or a summons to an unprecedented *in camera* proceeding where members of the court told them to take their federal claims to this Court.

Petitioners are now here. They deserve and are entitled to a hearing on the merits of their constitutional claim.

CONCLUSION

In rendering its final orders below, the Ohio Supreme Court disregarded its own procedures, its own Code of Judicial Conduct, the Codes of Judicial Conduct of 47 other states and this Court's Fourteenth Amendment teachings for the past half-century or more.

For these reasons—as set out above—petitioners ask that a writ of certiorari be granted.

Respectfully submitted,

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